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No. 1001

IN THE

SUPREME COURT OF THE UNITED STATES

APRIL TERM, A. D. 1941

ERNEST E. MARKS COMPANY, A CORPORATION,
(*Plaintiff*) *Appellant,*

vs.

THE UNITED STATES OF AMERICA,
(*Defendant*) *Appellee.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS AND BRIEF IN SUPPORT THEREOF.

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J. MILTON GUY,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Ernest E. Marks Company, plaintiff and appellant below, prays that a writ of certiorari issue to review the final order entered February 3, 1941, by the United States Court of Customs and Patent Appeals (Presiding Judge Garrett, and Associate Judges Bland, Hatfield, Lenroot, and Jackson) confirming the judgment of the United States Customs Court, Third Division (Evans, J.), entered March 21, 1940, overruling the plaintiff's protest against the decision of the Collector of Customs of the Port of Chicago.

SUMMARY STATEMENT OF THE CASE.

The case involves the correct rate of duty upon corn imported into the United States from the Republic of Argentina in the year 1936. The protest is representative of many other protests pending in the Port of Chicago and in other Ports, which other protests have been suspended under this case. The aggregate number of bushels of corn involved in all of these protests is estimated to exceed thirty million, and the total duties claimed by all of these importers to have been illegally collected are estimated as in excess of four million dollars.

Paragraph 724 of the Tariff Act of 1930 provides a duty rate upon corn at 25¢ per bushel. Section 350 as an amendment to the 1930 Tariff Act provided that the President might enter into foreign trade agreements with foreign governments and thereby modify the duty rate upon articles specified in such trade agreements by not more than fifty per centum, but that (Sub-section (b)) nothing in said amendatory act should be construed to prevent the application of the provisions of the Treaty of Commercial Reciprocity concluded between the United States and the Republic of Cuba on December 11, 1902, or to preclude giving effect to an exclusive agreement with Cuba concluded under said section, modifying the existing preferential customs treatment of articles the growth, produce, or manufacture of Cuba.

(Section 350 is set out in full in footnote 1, Appendix, pp. 19, 20.)

Pursuant to said Section 350, the President in 1934 proclaimed a trade agreement with the Republic of Cuba in and by which the duty rate upon corn (among other commodities) imported into the United States from Cuba was reduced to 10¢ per bushel. 10¢ per bushel was fifty per cent

of the then duty rate on Cuban corn, which rate under the Treaty of Commercial Reciprocity of 1902 was 20¢ per bushel rather than 25¢, Cuba, under said treaty, having been accorded a twenty per cent preferential rate as against other nations.

(The salient provisions of the Cuban Trade Agreement are hereunder set out in footnote 2, Appendix, pp. 20, 21.)

Sub-section 350 (a) provided that when the President should reduce duty rates in a trade agreement concluded thereunder with one nation, the reduced duty rates shall apply to articles the growth, produce, or manufacture of all foreign countries which the President finds do not discriminate against the United States. This is the so-called generalization provision, corresponding to the favored nation clauses of treaties.

The importer herein contended therefore that the President had thereby reduced the duty rate on corn imported from Cuba to 10¢ per bushel, and that the duty rate upon the corn in question in this protest was therefore reduced to 12½¢ per bushel, *i.e.*, to the amount of the Cuban reduction subject to the fifty per cent limitation. The importer demanded a refund accordingly, not only under the provisions of said Section 350, but also pursuant to the favored nation clause of the existing treaty with Argentina.

The defendant's answer to this contention was that the Cuban Trade Agreement provided that duty rate reductions accorded by the United States upon articles imported from Cuba were, by the terms of the agreement, made exclusively preferential to Cuba, and therefore were not generalized in favor of Argentina. To this, the importer's reply is:

(a) That the only portion of the reduction which was exclusively preferential to Cuba, as authorized by

Section 350, or as provided for in the Trade Agreement, was twenty per cent below the lowest rate charged upon importations from any other nation. Therefore, the preferential was exclusive to the extent of twenty per cent only, and the balance of the duty rate reduction was generalized, and duties should be refunded accordingly.

(b) That no possible authorization for an exclusively preferential rate reduction upon Cuban imports can be found in Section 350, since Cuba is referred to therein only in Sub-section (b), which simply provides that nothing contained in the authorizing Sub-section (a) shall *preclude* the President from giving effect to an exclusive agreement with Cuba. To state that nothing shall preclude the President is not an authorization, and the President was not thereby in any sense empowered to grant an exclusive preferential to Cuba. If the agreement purported to grant any such, the grant was void; and the rate reductions must therefore be generalized—in this case, in favor of the importer of Argentine corn.

(c) That Sub-section 350 (b), because it laid down no principle or yardstick whereby the President should be guided in determining when or under what conditions an exclusively preferential agreement with Cuba might be made, if deemed to have any affirmative significance, amounted to a delegation of legislative power to the President, and therefore is unconstitutional and void; in which case the reductions made for Cuba must also be generalized to Argentina under the broad generalization provision of Sub-section 350 (a).

The Customs Court and the United States Court of Customs and Patent Appeals held that Sub-section 350 (b) did authorize an exclusively preferential reduction upon Cuban

imports; did not decide whether or not Sub-section 350 (b) delegates a legislative function to the President and did not decide whether or not this sub-section is constitutional; and denied the importer's claim for refunds of that portion of the duties which were assessed and collected which the importer contends were illegally exacted. It is conceded by the defendant, we believe, that if Sub-section 350 (b) does not authorize the exclusive, or that if it is not constitutional, that the generalization clause of Subsection 350 (a) is applicable, and that the importer in such case would be entitled to the refunds.

BASIS OF JURISDICTION.

Jurisdiction of this court is invoked under the provisions of Section 195 of the Judicial Code as amended (U. S. Code Ann. Title 28, Sec. 308), providing for review of the judgments and decrees of the United States Court of Customs and Patents Appeals by this court upon certiorari. The order of the United States Court of Customs and Patent Appeals, affirming the judgment of the United States Customs Court, was entered on February 3, 1941. Application for a writ of certiorari is required to be made within three months after the final order of the United States Court of Customs and Patent Appeals (U. S. Code Ann. Title 28, Sec. 350), or, in this case, on or before May 3, 1941.

The Statutes of the United States, the validity of which is involved, are:

1—Sub-section 350 (b), enacted June 12, 1934, entitled "An Act to Amend the Tariff Act of 1930."

2—The Reciprocal Trade Agreement between the United States and the Republic of Cuba proclaimed August 24, 1934 (48 Stat. 943) in its provisions therein contained in Article III that articles the growth,

produce, or manufacture of the Republic of Cuba enumerated and described in Schedule II annexed thereto, should, on their importation into the United States of America, be granted exclusive and preferential reductions in duties.

The treaty, the integrity of which is involved, is the Treaty of 1853 between the United States and the Republic of Argentina, ratified by the Congress of the United States in the year 1855, in respect of Article IV thereof, which provides that no higher or other duty shall be imposed upon the importation into the territories of the two contracting parties, of any article of the growth, produce or manufacture of the territory of the other contracting party, than are, or shall be, payable on the like article of any other foreign country.

QUESTIONS PRESENTED.

Stated by the United States Court of Customs and Patent Appeals:

Whether Section 350, the Reciprocal Trade Agreement Act of 1934, authorized the President to make an exclusively preferential trade agreement with Cuba which would not be subject to the so-called generalization clause.

Whether said Trade Agreement was in fact such an exclusive agreement, none of the provisions of which inured to the benefit of any other foreign country.

Whether Sub-section 350 (b) of the Tariff Act authorized the granting of an exclusive preferential to Cuba.

Whether said Sub-section 350 (b) is constitutional.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

I.—CONSTITUTIONALITY OF SUB-SECTION 350(b).

The constitutionality of this Section is attacked by the importer in this case, and the issue of its constitutionality should be determined by this Court because of the far-reaching importance of this question.

II.—TREATY WITH ARGENTINA.

The importer herein contends that the decision of the lower Court violates the favored nation clause of the Treaty of Commercial Reciprocity between the United States and the Republic of Argentina, and until the United States Supreme Court has decided this issue, neither the American public, nor the Republic of Argentina can know whether or not this Treaty is being violated.

III.—IMPORTANCE OF QUESTIONS.

The Reciprocal Trade Agreements Act resulted in the proclaiming by the President of the United States of the Cuban Trade Agreement whereby tariff rates on dozens of articles imported into the United States have been reduced by fifty per cent. The applicability of the generalization proviso of Section 350 to these reductions is of immense importance to American importers and consumers and to foreign nations and their exporters. If the statute is in whole or in part invalid or otherwise insufficient to support a Cuban exclusive preferential, that fact should be so determined, at once, and for all time, by this Court, so that the same may be redrafted by the Congress if it shall so desire, or if it shall be found by this Court to be valid and subsisting, so that the public, and officials of all governments concerned, may be so notified.

IV.—NOVELTY OF QUESTIONS.

(a) The question of whether the Cuban Trade Agreement is preferential to the extent of one hundred per cent of the reduction in duty rates accorded Cuba, or only to the extent of twenty per cent of such reduction, has been before the United States Customs Court and the United States Court of Customs and Patent Appeals numerous times, yet the question has never been passed upon by the United States Supreme Court.

(b) The question of whether Section 350, the amendment to the Tariff Act of 1930, authorized the President to make an exclusively preferential trade agreement, has been passed upon by the United States Court of Customs and Patent Appeals, but has never been adjudicated by this Court.

(c) The question of the constitutionality of Sub-section 350 (b) of said Reciprocal Trade Agreements Act, has been considered but once (in the case at bar in the Court below, which did not decide the question of its constitutionality) and never has been decided by this Court.

* * * * * * *

WHEREFORE your petitioner respectfully prays that a writ of certiorari issue out of and under the seal of this Court to review the order and judgment of the United States Court of Customs and Patent Appeals, and that the order of said Court be reversed, and this cause be remanded with directions to sustain the plaintiff's protest and order refunds accordingly.

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IN THE

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APRIL TERM, A. D. 1941

No. .....

ERNEST E. MARKS COMPANY, A CORPORATION,
(*Plaintiff*) *Appellant,*

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THE UNITED STATES OF AMERICA,
(*Defendant*) *Appellee.*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

1.—OPINIONS OF THE COURTS BELOW.

The opinion of the United States Customs Court, Third Division, appears at page 12, *et seq.*, in the printed transcript of the record in the United States Court of Customs and Patent Appeals. It is reported as C. D. 305. The opinion of the United States Court of Customs and Patent Appeals appears at page 27, *et seq.*, of the record. It is reported as C.A.D. 156, Vol. 76, No. 34, dated February 20, 1941.

2.—JURISDICTION.

The grounds for the jurisdiction of this Court are stated in the petition annexed. The petition is filed in accordance with Rules 38 and 43 of this Court.

3.—STATEMENT OF THE CASE.

The facts are sufficiently stated in the "Summary Statement of the Case" included in the petition to which this brief is attached.

4.—SPECIFICATION OF ERRORS.

It is submitted that the United States Court of Customs and Patent Appeals erred in the following particulars:

(a) In holding that the effect of the Reciprocal Trade Agreement with Cuba of 1934 was to make the entire amount of the reductions in duty rates therein established exclusively preferential to Cuba, rather than only twenty per cent thereof.

(b) In finding that Sub-section 350 (b) authorized the President to proclaim a trade agreement containing reductions in duty rates exclusively preferential to Cuba.

(c) In not holding that Sub-section 350 (b) was unconstitutional, void, and of no effect.

(d) In not finding that the reduction in duties upon importations to the United States from Cuba established by the Cuban Trade Agreement of 1934 must be generalized to other nations.

(e) In not finding that the treaty between the United States and the Argentine Republic requires that the lowest duty rate accorded upon any articles imported into the United States from Cuba must also be accorded upon like articles imported into the United States from Argentina.

(f) In not finding that the correct duty rate upon corn imported from Argentina was 12½¢ per bushel.

(g) In failing to reverse the judgment appealed from and to remand the cause to the United States Customs Court with directions to order a refund of the duty paid in excess of the legal rate.

5.—SUMMARY OF ARGUMENT.

I.

The only portion of the reduction in the duty rate upon imports from Cuba which the amendment to the Tariff Act of 1934 authorized, or for which the trade agreement provided, which was exclusively preferential to Cuba, was twenty per cent below the lowest rate charged upon exportations from any other nation. The maximum rate of duty upon corn according to the Cuban Trade Agreement was 10 cents per bushel. If this maximum rate is to reflect a twenty per cent exclusively preferential discount, then 10 cents per bushel must be eighty per cent of the general rate. The duty rate upon corn imported from all other non-discriminating or favored treaty nations was thereby fixed at 12½ cents per bushel.

II.

As an alternative contention:

(A) Section 350 did not authorize the President to place, in trade agreements with Cuba (which trade agreements the Act DID authorize) ANY provision granting exclusively preferential treatment to Cuba;

(B) If the trade agreement of 1934, which was effected pursuant to Section 350, purported to grant unto Cuba any exclusive preferential, such purported exclusive in the trade agreement was not authorized, and is therefore void and of no effect. The non-exclusive reduction, however, WAS authorized in Subsection 350 (a) by Congress, and hence must be generalized to other nations. The exclusive feature, only, of the trade agreement is void; the balance of the agreement is valid and operative.

III.

Sub-section 350 (b) is unconstitutional and void if construed to have any affirmative significance. It therefore does not authorize an exclusive preferential to Cuba in duties upon Cuban imports into the United States. Thus, the generalization clause of Sub-section 350 (a) applies to the Cuban Trade Agreement, and the duty rate thereby reduced must be accorded upon articles imported from Argentina, to-wit, upon the corn in question.

ARGUMENT.

I.

The purpose of Section 350 is expressed in that Act as being to expand foreign trade of the United States, and to effect such purpose the Congress provided for generalization to all countries of all concessions specified in any trade agreement. No reduction of any rate of duty could be confined to any one country.

Sub-section 350 (a) was intended by Congress to preserve to Cuba its preferential status under the 1902 Treaty, and is the sole authority vested in the President to make changes in duty apart from the continuation or modification of the Cuban preferential. A construction of Section 350 to the effect that all concessions granted to Cuba, including concessions in excess of the twenty per cent preferential established in the 1902 Treaty, are exclusively preferential, must result either in holding that the Cuban Trade Agreement could be violated by subsequent trade agreements with other countries, or that such later agreements are invalid.

Section 350 did not authorize that the Cuban rate reductions be exclusive to the extent of more than twenty per cent. If the Cuban Agreement purported to authorize an exclusive preferential of more than twenty per cent, to the extent of the excess the preferential was not authorized by Congress, and was therefore null and void. Therefore, the only exclusively preferential duty rate reduction effected by the Cuban Trade Agreement of 1934 was to the extent of twenty per cent, and the difference between this reduction and the general reduction was not an exclusive, was generalized, and should be ordered refunded to the importer.

II.

This is an alternative contention, under which the importer claims that Section 350 did not authorize any exclusively preferential trade agreement with Cuba whatsoever, and that therefore any purported exclusive in the Cuban Trade Agreement was void.

Sub-section 350 (b) provides that nothing in the section shall be construed to *prevent* the application of the provisions of the Treaty of 1902, *or to preclude* giving effect to an exclusive agreement with Cuba concluded under this section.

Sub-section (a) specifically authorized the President to reduce duty rates by a trade agreement with any foreign nation provided that such reduction should be extended to the benefit of all other non-discriminating nations. It has been held by the United States Court of Customs and Patent Appeals that Cuba is a foreign nation, and that excepting for Sub-section (b), the reduction granted Cuba by the Trade Agreement would not in any sense be preferential and would necessarily be generalized to the benefit of the importer of a like article from a non-discriminating nation. *F. H. Von Damm* v. *U. S.*, 25 C.C.P.A. 97, page 103.

Congress in Sub-section (b) did not authorize the President to do anything. The sub-section simply states that nothing in (a) shall prevent or preclude the President from giving effect to exclusive agreements. But the exclusive itself is not authorized in (a) or in any other statute. It is obvious from reading (a) that nothing therein prevents or precludes the President—for example, from reducing the rate on corn imported from Argentina to 12½¢ per bushel, or from increasing the rate on Cuban corn to 40¢ per bushel, or from negotiating a new treaty with Argentina,

or from doing any one of a thousand different acts, either germane or irrelevant to Sub-section (a).

The simple fact that Congress stated in (b) that nothing in (a) prevents a certain Presidential act, does not mean that (b) authorizes the President to do such act. (b) merely states that (a) contains no inhibitions. Manifestly, if (a) does not authorize an exclusive, and (b) does not even say that (a) does, no authorization for the exclusive is to be found.

A court is without power to supply statutory omissions or to read into a piece of legislation, language which is actually not there. Even though it be deemed that the Congressional intent was to authorize the President to conclude an exclusively preferential trade agreement with Cuba, the missing authority cannot be supplied by the Court if it does not appear in the language of the statute itself. Black, Interpretation of Statutes, 1911, pages 45 to 55; *Proctor & Gamble Mfg. Co.* v. *U. S.*, 19 C.C.P.A. 415, at page 418; *Woodbury* v. *Berry*, 18 Ohio St. 456; *Maltus* v. *U. S.*, 6 Ct. Cust. Appls. 525.

We therefore contend that Sub-section (b) does not limit the broad authority contained in Sub-section (a) to the President to make a trade agreement with Cuba the benefits of which in its reduction of duty rates are generalized to the products from all other non-discriminating nations, including Argentina.

Moreover, Section 350 could not authorize any exclusive preferential because Sub-section 350 (c) limits the modification to duties or import restrictions, whereas the exclusive preferential is neither; in fact, it is their exact antithesis.

III.

This Court in the case of *Hampton, Jr. & Company* v. *U. S.*, 276 U. S. 624 (and in numerous other decisions), laid down certain standards for the determination of what type of legislation violates the Constitution of the United States by purportedly delegating to the Executive, legislative and treaty-making power. These decisions have shown that no Congressional delegation of power to the President is valid, which necessarily involves a discretion in the President as to what the law should be.

The decisions hold that the Congress must lay down by the legislative Act an intelligible principle, a standard, or yardstick, to or by which the Executive authorized to act pursuant to the legislation must conform; otherwise the discretionary authority granted to the Executive by the Congress is a forbidden delegation of legislative power.

Sub-section (a) complies with these requirements for constitutional validity. Thereunder a certain fact must exist, and the President must so find, to-wit, that existing duties or other import restrictions are unduly burdening or restricting the foreign trade of the United States, which burdens and restrictions may be relieved by the execution of trade agreements. The fact itself is to be found by the President in the manner provided by the statute.

Assuming that such fact shall exist and that the conclusion of any such trade agreement would operate as a curative, the Congress, upon this presupposed condition, determined that a revision of duty rates of not to exceed fifty per cent would be salutary, and therefore legislated that in such event such revision should be made operative. The President thereby was merely constituted the agent of the legislature to ascertain and declare the event upon which the Congress' expressed will that duty rates upon certain

articles should be reduced by fifty per cent, was to take effect.

Sub-section (b) is grounded upon an entirely different principle. No standards are thereby established to circumscribe the Presidential act. No statements of policy or principle are therein set forth to which the President in his ministerial function is required to conform. The discretion which fixes the terms of the exclusive preferential does not reside in the legislators who voted the enactment, but in the Executive, and it is upon his exercise of his own discretion that exclusively preferential treatment to Cuba shall, or shall not, be accorded.

There is no principle, not one single guide or term, in Sub-section (b), conformably to which the President is required to act. There is no standard, no pattern, no condition precedent, no instruction, not even any limitation to which it is required that the President refer, or consider, prior to concluding any exclusively preferential trade agreement with Cuba which he may in his unlimited discretion desire to proclaim.

No particular fact is necessary to be found to support the exclusive, or any yardstick laid down as to when he may or may not give or refuse it. If construed to authorize the exclusive, Sub-section (b) amounts to an absolute grant of unlimited legislative power to the President to make an exclusive agreement as he shall see fit, and is therefore unconstitutional and void.

IV.

Because Section 350 has extended the principle of the favored nation clause of treaties to all non-discriminating nations when reciprocal trade agreements are proclaimed, the distinction formerly established by this Court in the cases of *Bartram* v. *Robertson,* 122 U. S. 116, and *Whitney* v. *Robertson,* 120 U. S. 190, between the so-called "condi-

tional" and the so-called "unconditional" favored nation clauses, has been abolished by this statute. Therefore, the extension of preferential treatment to Cuba by the 1934 Trade Agreement amounts to a violation of the existing treaty between the United States and Argentina. While Congress has the power to violate a treaty (as distinguished from the right), the Executive has no such power.

CONCLUSION.

A reading of Section 350 shows that no authority is therein provided for the granting of an exclusive preferential to Cuba. An examination of Sub-section 350 (b) in the light of the decisions of this Court discloses that it is unconstitutional in its delegation of legislative and treaty-making powers to the Executive without the establishment of any yardstick for the exercise of such power.

Under the generalization provision of Section 350 and under the favored nation treaty with Argentina, if Sub-section (b) does not validly authorize an exclusive preferential, then the lowered Cuban duty rate must be generalized in favor of the importer. But even if any warrant for an exclusive preferential to Cuba can be read into Section 350, the amount of the preferential could not exceed twenty per cent of the amount of the rate reductions under the Cuban agreement.

It is submitted that the importer is entitled to the refund of duties claimed.

Respectfully submitted,

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APPENDIX.

FOOTNOTE 1

"SEC. 350 (a) For the purpose of expanding foreign markets for the products of the United States (as a means of assisting in the present emergency in restoring the American standard of living, in overcoming domestic unemployment and the present economic depression, in increasing the purchasing power of the American public, and in establishing and maintaining a better relationship among various branches of American agriculture, industry, mining, and commerce) by regulating the admission of foreign goods into the United States in accordance with the characteristics and needs of various branches of American production so that foreign markets will be made available to those branches of American production which require and are capable of developing such outlets by affording corresponding market opportunties for foreign products in the United States, the President, whenever he finds as a fact that any existing duties or other import restrictions of the United States or any foreign country are unduly burdening and restricting the foreign trade of the United States and that the purpose above declared will be promoted by the means hereinafter specified, is authorized from time to time—

"(1) To enter into foreign trade agreements with foreign governments or instrumentalities thereof; and

"(2) To proclaim such modifications of existing duties and other import restrictions, or such additional import restrictions, or such continuance, and for such minimum periods, of existing customs or excise treatment of any article covered by foreign trade agreements, as are required or appropriate to carry out any foreign trade agreement that the President has entered into hereunder. No proclamation shall be made increasing or decreasing by more than 50 per centum any existing rate of duty or transferring any article between the dutiable and free lists. The proclaimed duties and other import restrictions shall apply to articles the growth, produce, or manufacture of all foreign countries, whether imported directly, or indirectly: PROVIDED, That the President may suspend the application to articles the growth, produce, or manufacture of any country because of its discriminatory treatment of American commerce or because of other acts or policies which in his opinion tend to defeat the purposes set forth in this section;

and the proclaimed duties and other import restrictions shall be in effect from and after such time as is specified in the proclamation. The President may at any time terminate any such proclamation in whole or in part.

"(b) Nothing in this section shall be construed to prevent the application, with respect to rates of duty established under this section pursuant to agreements with countries other than Cuba, of the provisions of the treaty of commercial reciprocity concluded between the United States and the Republic of Cuba on December 11, 1902, or to preclude giving effect to an exclusive agreement with Cuba concluded under this section, modifying the existing preferential customs treatment of any article the growth, produce, or manufacture of Cuba: PROVIDED, That the duties payable on such an article shall in no case be increased or decreased by more than 50 per centum of the duties now payable thereon.

"(c) As used in this section, the term 'duties and other import restrictions' includes (1) rate and form of import duties and classification of articles, and (2) limitations, prohibitions, charges, and exactions other than duties, imposed on importation or imposed for the regulation of imports."

FOOTNOTE 2—(Cuban Trade Agreement of 1934).

"ARTICLE XVI.

"The operation of the provisions of the Commercial Convention, concluded between the United States of America and the Republic of Cuba on December 11, 1902, shall be suspended on the day on which the present agreement comes into force. In the event of the expiration or the denunciation of the present agreement, the provisions of the aforesaid Convention of 1902 shall automatically resume operation and shall continue in full free and effect as provided therein."

"ARTICLE III.

"Articles the growth, produce, or manufacture of the Republic of Cuba, enumerated and described in Schedule II annexed hereto and made a part of this Agreement, shall, on their importation into the United States of America, be granted exclusive and preferential reductions in duties not less than the percentages specified respectively in Column 1 of the said Schedule, such percentages of reduction being applied to the lowest rates of duty, respectively, now or

hereafter payable on like articles the growth, produce, or manufacture of any other foreign country.

"No article the growth, produce, or manufacture of the Republic of Cuba, enumerated and described in Schedule II annexed hereto, with respect to which a rate of duty is specified in Column 2 of the said Schedule, shall in any case, except as provided in Article VIII or X, be subject to any customs duty in excess of the rate so specified.

"Every article the growth, produce, or manufacture of the Republic of Cuba which is not provided for in Article I, and which is not enumerated and described in Schedule II annexed to this Agreement, shall, on importation into the United States of America, be granted an exclusive and preferential reduction in duty of not less than 20 per centum, such percentage of reduction being applied to the lowest rate of duty now or hereafter payable on the like article the growth, produce, or manufacture of any other foreign country."

(Schedule II above referred to is copied below in so far as it seems pertinent to this case:)

"SCHEDULE II

"Tariff Act of 1930 (paragraph)	Description of Articles	Column 1 Minimum preferential reduction to Cuba.	Column 2 Maximum rates of duty. Specific rates in United States dollars.
	NOTE—The provisions of this Schedule shall be construed and given the same effect, and the application of collateral provisions of the tariff laws of the United States to the provisions of this Schedule shall be determined in so far as may be practicable, as if each provision of this Schedule appeared respectively in the paragraph of the Tariff Act of 1930 noted in the column at the left of the respective descriptions of articles.		
* * * * * * * * * * * * * * * * * * * *			
724	Corn or maize, * *	20 per cent	0.10 per bushel of 56 pounds.
* * * * * * * * * * * * * * * * * * * *			

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Treaty entered into between the United States and the Argentine Confederation, dated July 27, 1853, ratified April 9, 1855 (10 Stat. 1005):	
Art. III	14
Art. IV	14

317181—41

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 1001

ERNEST E. MARKS CO., A CORPORATION, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Customs Court (R. 12) is reported in Treasury Decisions, Vol. 75, advance sheets No. 40 (March 21, 1940), p. 15. The opinion of the United States Court of Customs and Patent Appeals (R. 27) is reported in 117 F. (2d) 542, and in Treasury Decisions, Vol. 76, advance sheets No. 34 (February 20, 1941), p. 40.

JURISDICTION

The judgment of the United States Court of Customs and Patent Appeals was entered on February 3, 1941 (R. 36). The petition for a writ

of certiorari was filed on April 29, 1941. The jurisdiction of this Court is invoked under section 195 of the Judicial Code, as amended (U. S. C., Title 28, Sec. 308).

QUESTIONS PRESENTED

Whether certain reductions in tariff rates granted to Cuba in the trade agreement entered into between the United States and the Republic of Cuba on August 24, 1934, *infra,* p. 11, pursuant to the authority granted to the President by the Trade Agreement Act of June 12, 1934 (section 350 of the Tariff Act of 1930, as amended), are automatically extended to all nondiscriminating countries, including Argentina, and whether corn imported from Argentina is subject to duty, as assessed by the collector, at the rate of 25 cents per bushel of 56 pounds, as provided for under paragraph 724 of the Tariff Act of 1930, *infra,* p. 7, or at the rate of 10 cents per bushel of 56 pounds or other lower rate claimed under the provisions of the Cuban Trade Agreement, *supra,* and the treaty with Argentina, *infra,* p. 14.

STATUTES INVOLVED

The pertinent parts of the statutes, treaties, and agreement involved are set forth in an Appendix, *infra,* pp. 7–14.

STATEMENT

The Trade Agreement Act of June 12, 1934, 48 Stat. 943 (Appendix, *infra,* pp. 7–9), authorizes the President to enter into trade agreements with for-

eign countries and to proclaim such modifications of existing duties, subject to certain limitations, as are required or appropriate to carry out any foreign trade agreement entered into. The Act also contains a so-called "generalization clause" which provides, in substance, that the proclaimed duties and other import restrictions shall apply to all articles the growth, produce, or manufacture of all nondiscriminating foreign countries. The Act further provides that nothing therein shall prevent the President from making an exclusive agreement with Cuba modifying the existing preferential customs treatment of any article the growth, produce, or manufacture of Cuba. Acting under the authority of the Act, the President, on August 24, 1934, entered into an agreement with the Republic of Cuba (49 Stat. 3559, *infra,* pp. 11–13) wherein the minimum preferential reduction to Cuba on corn was fixed at 20 per centum and the maximum rate of duty on corn was fixed at 10 cents per bushel of 56 pounds.

Thereafter the petitioner, in 1936, imported into the United States certain corn from Argentina which was assessed for duty by the collector of customs at 25 cents per bushel of 56 pounds under the provisions of paragraph 724 of the Tariff Act of 1930, *infra,* p. 7. The petitioner filed a protest claiming that the assessment of duties made herein was illegal and void and that the corn in question was properly dutiable at 10

cents per bushel of 56 pounds, or at various other rates, by virtue of the generalization clause contained in the Trade Agreement Act of June 12, 1934, the trade agreement subsequently entered into between the United States and Cuba, and the Argentine Treaty of 1853, *infra*, p. 14.

The United States Customs Court sustained the action of the collector (R. 12–26), and on appeal the United States Court of Customs and Patent Appeals unanimously affirmed the judgment of the Customs Court (R. 27–36), holding that the Trade Agreement Act authorized the President to make an exclusive agreement with Cuba; that the agreement entered into with Cuba pursuant thereto was an exclusive agreement and that therefore the reductions therein granted to Cuba did not extend to Argentina, or to any other nondiscriminating country, under the generalization clause contained in said Act, or by reason of the conditional most-favored-nation clause contained in the Argentine Treaty of 1853.

ARGUMENT

The basic issues here involved have previously been adjudicated by the court below contrary to petitioner's position, and this Court has denied certiorari. *Von Damm* v. *United States,* 90 F. (2d) 263, 25 C. C. P. A. 97, certiorari denied, 302 U. S. 722; *Edward & John Burke, Ltd.,* v. *United States,* 26 C. C. P. A. 374, certiorari denied, 308 U. S. 564. See also *Louis Wolf & Co.*

v. *United States,* 107 F. (2d) 819, 27 C. C. P. A. 188; *Geo. W. Cole & Co.* v. *United States,* 107 F. (2d) 815, 27 C. C. P. A. 201. Moreover, the decision below is plainly correct, and there is no occasion for further review.

Section 350 (a) of the Trade Agreement Act authorizes the President to enter into trade agreements with foreign countries, subject to specified limitations, and provides, in substance, that the duties proclaimed in pursuance of any such agreement shall extend to all nondiscriminating countries. Subsection (b), however, expressly permits Cuba to be excepted from the sweeping provisions of (a), and shows that Congress intended to authorize the President to make an *exclusive* agreement with Cuba the benefits of which would not extend to any other country. These provisions were simply in furtherance of our national policy of according preferential treatment to Cuba, a policy which was established by the Cuban Convention of 1902, and continued by Congress in Section 316 of the Tariff Act of 1930.

Petitioner in this case makes the further contention that if subsection (b) be construed to authorize an exclusive agreement with Cuba it is an unconstitutional delegation of legislative power to the President. But the broad provisions of subsection (a) themselves are plainly valid (cf. *United States* v. *Curtiss-Wright Export Corp.,* 299 U. S. 304; *Hampton & Co.* v. *United States,*

276 U. S. 394), and subsection (b) is simply a limitation upon the provisions of subsection (a). The authority to enter into trade agreements is conferred by subsection (a) which provides further that the rates shall be generalized to other countries, thus impliedly forbidding an exclusive agreement. Subsection (b) then provides in effect that the generalization clause shall not preclude an exclusive agreement with Cuba. It is difficult to see how the provisions of subsections (a) and (b), taken together, afford any less definite standard than the provisions of subsection (a) standing alone, which petitioner does not appear to challenge.

CONCLUSION

The decision below is correct and this Court has already declined to review the main questions presented. There are no conflicts. The petition should be denied.

Respectfully submitted.

FRANCIS BIDDLE,
Solicitor General.

CHARLES D. LAWRENCE,
Acting Assistant Attorney General.

CHARLES J. MIVILLE,
Special Attorney.

JOHN R. BENNEY, *Attorney.*

MAY 1941.

APPENDIX

STATUTES

Tariff Act of 1930, c. 497, 46 Stat. 590:

Par. 724. Corn or maize, including cracked corn, 25 cents per bushel of fifty-six pounds; corn grits, meal, and flour, and similar products, 50 cents per one hundred pounds.

SEC. 316. CUBAN RECIPROCITY TREATY NOT AFFECTED.

Nothing in this Act shall be construed to abrogate or in any manner impair or affect the provisions of the treaty of commercial reciprocity concluded between the United States and the Republic of Cuba on December 11, 1902, or the provisions of the Act of December 17, 1903, chapter 1.

Section 350, as amended June 12, 1934, c. 474, 48 Stat. 943:

AN ACT To Amend the Tariff Act of 1930

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Tariff Act of 1930 is amended by adding at the end of Title III the following:

PART III. PROMOTION OF FOREIGN TRADE

SEC. 350. (a) For the purpose of expanding foreign markets for the products of the United States (as a means of assisting in the present emergency in restoring the American standard of living, in overcoming

domestic unemployment and the present economic depression, in increasing the purchasing power of the American public, and in establishing and maintaining a better relationship among various branches of American agriculture, industry, mining, and commerce) by regulating the admission of foreign goods into the United States in accordance with the characteristics and needs of various branches of American production so that foreign markets will be made available to those branches of American production which require and are capable of developing such outlets by affording corresponding market opportunities for foreign products in the United States, the President, whenever he finds as a fact that any existing duties or other import restrictions of the United States or any foreign country are unduly burdening and restricting the foreign trade of the United States and that the purpose above declared will be promoted by the means hereinafter specified, is authorized from time to time—

(1) To enter into foreign trade agreements with foreign governments or instrumentalities thereof; and

(2) To proclaim such modifications of existing duties and other import restrictions, or such additional import restrictions, or such continuance, and for such minimum periods, of existing customs or excise treatment of any article covered by foreign trade agreements, as are required or appropriate to carry out any foreign trade agreement that the President has entered into hereunder. No proclamation shall be made increasing or decreasing by more than 50 per centum any existing rate of duty or transferring any article between the dutiable and free lists. The proclaimed duties and other

import restrictions shall apply to articles the growth, produce, or manufacture of all foreign countries, whether imported directly, or indirectly: *Provided*, That the President may suspend the application to articles the growth, produce, or manufacture of any country because of its discriminatory treatment of American commerce or because of other acts or policies which in his opinion tend to defeat the purposes set forth in this section; and the proclaimed duties and other import restrictions shall be in effect from and after such time as is specified in the proclamation. The President may at any time terminate any such proclamation in whole or in part.

(b) Nothing in this section shall be construed to prevent the application, with respect to rates of duty established under this section pursuant to agreements with countries other than Cuba, of the provisions of the treaty of commercial reciprocity concluded between the United States and the Republic of Cuba on December 11, 1902, or to preclude giving effect to an exclusive agreement with Cuba concluded under this section, modifying the existing preferential customs treatment of any article the growth, produce, or manufacture of Cuba: *Provided,* That the duties payable on such an article shall in no case be increased or decreased by more than 50 per centum of the duties now payable thereon.

(c) As used in this section, the term "duties and other import restrictions" includes (1) rate and form of import duties and classification of articles, and (2) limitations, prohibitions, charges, and exactions other than duties, imposed on importation or imposed for the regulation of imports.

* * * * *

Convention of Commercial Reciprocity Between the United States and Cuba of 1902

(33 Stat. (Pt. 2) 2136)

* * * * *

ARTICLE II

During the term of this convention, all articles of merchandise not included in the foregoing Article I and being the product of the soil or industry of the Republic of Cuba imported into the United States shall be admitted at a reduction of twenty per-centum of the rates of duty thereon as provided by the Tariff Act of the United States approved July 24, 1897, or as may be provided by any tariff law of the United States subsequently enacted.

* * * * *

ARTICLE VIII

The rates of duty herein granted by the United States to the Republic of Cuba are and shall continue during the term of this convention preferential in respect to all like imports from other countries, and, in return for said preferential rates of duty granted to the Republic of Cuba by the United States, it is agreed that the concession herein granted on the part of the said Republic of Cuba to the products of the United States shall likewise be, and shall continue, during the term of this convention, preferential in respect to all like imports from other countries. * * *

Trade Agreement—Cuba

(49 Stat. 3559)

By the President of the United States of America

A Proclamation

Whereas, I, Franklin D. Roosevelt, President of the United States of America, have, on August 24, 1934, pursuant to and in accordance with the provisions of the Act of Congress, approved June 12, 1934, entitled "An Act to Amend the Tariff Act of 1930", entered into a Trade Agreement, with two attached Schedules, with the President of the Republic of Cuba, which Agreement and Schedules in the English and Spanish languages are in words and figures as follows:

The President of the United States of America and the President of the Republic of Cuba, desirous of strengthening the traditional bonds of friendship and commerce between their respective countries by maintaining as the basis for their commercial relations the granting of reciprocal preferential treatment, in continuation of the policy adopted in the Convention of Commercial Reciprocity of 1902 between the two countries, and taking into consideration that changed conditions have rendered it necessary to modify the provisions of that Convention, have arrived at the following Agreement:

* * * * *

ARTICLE III

Articles the growth, produce or manufacture of the Republic of Cuba enumerated and described in Schedule II annexed hereto and made a part of this Agreement, shall, on their importation into the United States of America, be granted exclusive and preferential reductions in duties not less than the percentages specified respectively in Column 1 of the said Schedule, such percentages of reduction being applied to the lowest rates of duty, respectively, now or hereafter payable on like articles the growth, produce or manufacture of any other foreign country.

No article the growth, produce or manufacture of the Republic of Cuba enumerated and described in Schedule II annexed hereto, with respect to which a rate of duty is specified in Column 2 of the said Schedule, shall in any case, except as provided in Article VIII or X, be subject to any customs duty in excess of the rate so specified.

Every article the growth, produce or manufacture of the Republic of Cuba which is not provided for in Article I, and which is not enumerated and described in Schedule II annexed to this Agreement, shall, on importation into the United States of America, be granted an exclusive and preferential reduction in duty of not less than 20 per centum, such percentage of reduction being applied to the lowest rate of duty now or hereafter payable on the like article the growth, produce or manufacture of any other foreign country.

* * * * *

ARTICLE XVI

The operation of the provisions of the Commercial Convention, concluded between the United States of America and the Republic of Cuba on December 11, 1902, shall be suspended on the day on which the present Agreement comes into force. In the event of the expiration or the denunciation of the present Agreement, the provisions of the aforesaid Convention of 1902 shall automatically resume operation and shall continue in full force and effect as provided therein until the expiration of one year from the day on which the Government of either country shall have given notice to the other Government of an intention to terminate it.

* * * * *

(Schedule I Omitted)

SCHEDULE II

Tariff Act of 1930 paragraph	Description of articles	Column 1 *Minimum preferential reduction to Cuba*	Column 2 *Maximum rates of duty. Specific rates in U. S. dollars*
•	• •	•	•
724	Corn or maize, including cracked corn	20%	0.10 per bushel of 56 pounds

TREATY ENTERED INTO BETWEEN THE UNITED STATES AND THE ARGENTINE CONFEDERATION, DATED JULY 27, 1853, RATIFIED APRIL 9, 1855

(10 Stat. 1005)

* * * * *

ARTICLE III

The two high-contracting parties agree that any favor, exemption, privilege, or immunity whatever, in matters of commerce or navigation, which either of them has actually granted, or may hereafter grant, to the citizens or subjects of any other government, nation, or State, shall extend, in identity of cases and circumstances, to the citizens of the other contracting party, gratuitously, if the concession in favor of that other government, nation, or State, shall have been gratuitous; or, in return for an equivalent compensation, if the concession shall have been conditional.

ARTICLE IV

No higher or other duties shall be imposed on the importation into the territories of either of the two contracting parties, of any article of the growth, produce, or manufacture of the territories of the other contracting party, than are, or shall be, payable on the like article of any other foreign country; * * *

U. S. GOVERNMENT PRINTING OFFICE: 1941

Office - Supreme Court, U. S.
FILED
MAY 22 1941
CHARLES ELMORE CROPLEY
CLERK

No. 1001

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APRIL TERM, A. D. 1941

ERNEST E. MARKS COMPANY, A CORPORATION,
(*Plaintiff*) *Appellant,*

vs.

THE UNITED STATES OF AMERICA,
(*Defendant*) *Appellee.*

BRIEF IN REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION TO THE PETITION OF ERNEST E. MARKS COMPANY FOR A WRIT OF CERTIORARI.

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The plaintiff wishes to correct the statements made at pages 4 and 6 of the defendant's argument and conclusion that the basic issues have previously been adjudicated by the Court below contrary to the petitioner's position, and that this Court has denied certiorari and declined to review the main questions presented. (Citing cases.) These statements are inaccurate.

Two of the three main points raised by the petitioner in the Court below were:

(a) That Section 350 grants no authorization to the President to make an exclusively preferential trade agreement with Cuba; and

(b) That Section 350(b) is unconstitutional.

These points were not raised or adjudicated in the cases cited in the defendant's brief, or in any other case of which the petitioner is aware, excepting in the case at bar.

Respectfully submitted,

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